Supreme Court, U.S.
FILED
JAN 27 2005
OFFICE OF THE CLERK

No. 04-10888

IN THE

SUPREME COURT OF THE UNITED STATES

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LUIS HUMBERTO SILVA
NORA PATRICIA SILVA---- Petitioners

v.

JOHN ASHCROFT ATTORNEY GENERAL ---
Respondent

---

On Petition for A Writ Of Certiorari To
United States Court of Appeal, Ninth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

A. DID THE NINTH CIRCUIT COURT OF APPEAL ERR IN DENYING PETITIONER'S MOTION FOR REVIEW

## LIST OF PARTIES

The party in this case is the United States Immigration and Naturalization Service.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] is unpublished.

## JURISDICTION

[X] For cases from federal court

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 23, 2004, and a copy of the order denying rehearing appears at Appendix A.

The jurisdiction of this court is invoked under 28 U. S. C. Section 1254 (1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

## STATUTES


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## STATEMENT OF THE CASE

Petitioners are husband and wife who are both natives and citizens of Mexico. They entered the United States without inspection in January 1990. Petitioners were subsequently placed in immigration proceedings and became subject to removal. At their Immigration Hearing on October 2, 2002, the Petitioners admitted the factual allegations and requested relief in the form of Cancellation of Removal pursuant to INA Section 240 A (1)(b).

The Immigration Judge found that the Petitioners met the requirements of continuous physical presence and good moral character. The Immigration Judge determined however that the Petitioners did not meet the standard of hardship required for granting of the waiver and permitting Cancellation of Removal.

The decision of the Immigration Judge was then appealed to the Board of Immigration Appeals. On April 29, 2002, the Board of Immigration Appeals dismissed the appeal of Petitioner citing a lack of jurisdiction.

Petitioner then filed a Petition For Review and Stay of Deportation with the Ninth Circuit Court of Appeals which was denied on November 23, 2004.

The Ninth Circuit Court of Appeals denied Petitioner's Motion on August 19, 2004.

The Petitioner now files his Petition for a Writ of Certiorari with the Supreme Court of the United States.

## A. THE COURT OF APPEAL ERRED BY FAILING TO GRANT PETITIONER'S MOTION FOR REVIEW

Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control. The Chinese Exclusion Case, 130 U.S. 581 (1889), Fong Yue Ting v. United States, 149 U.S. 698, (1893), Knauff v. Shaughnessy, 338 U.S. 537 (1950).

However it is also clear that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to the traditional standards of fairness encompassed in due process of law. The Japanese Immigrant Case, 189 U.S. 186 (1903); Woo Yan Sung v. McGrath, 339 U.S. 33, (1950), Kwong Hai Chew v. Colding 344 U.S. 590, 598, (1953),

In Wong Yang Sung v. McGrath, 339 U.S. 33, (1950), it is stated that "Our law may, and does place more restrictions on the alien then the citizen. But basic fairness in hearing procedure does not vary with the status of the accused. If the procedures used to judge the alien are fair and just, no good reason can be give why they should not be extended to simplify the condemnation of the citizens. If they would be unfair to citizens, we cannot defend fairness of them when applied to the more helpless alien. This is at the root of our holdings that the alien must be given a fair hearing to test an official claim that he is one of a deportable class."

The court in Shaughnessy v. Mezei, 345 U.S. 206 (1953) further elaborated as follows, "The most scrupulous observance of due process, including the right to know a charge, to be confronted with the accuser, to

cross-examine witnesses, and to produce evidence in one's own behalf, is especially necessary. The court stated both the old proceedings by which one may be bound to keep the peace, and the newer systems are safeguarded with full rights to judicial hearings for the accused. On the contrary, the Nazi regime in Germany installed a system of "protective custody" by which the arrested could claim no judicial or other hearing process. As a result the country was filled with concentration camps and summary detentions and deportations. Such practices once established with the best of intentions, will drift into the oppression of the disadvantaged in this country as surely as it has elsewhere. Differences in the process of administration make all the difference between a reign of terror and one of law."

It is well-settled that the Fifth Amendment entitles an alien to due process of law in a removal proceedings. Reno v. Flores, 507 U.S. 292, 306, 123 L.Ed.2d, 1, 113 S. CT. (1993); also Felzcerek v. INS, 75 F. 3d 112, 115 (2nd Cir. 1996).

Herein the Petitioners seek due process by asking for a Stay of Removal pending a review of the merits of their case. Petitioners contest that the Ninth Circuit Court lacks jurisdiction and assert that due process entitles them to a Stay of Deportation and a fair hearing on the issues of entitlement to relief from deportation. Denial of review in this instance serves no equitable purpose and serves to punish the Petitioners for the error of the judge in not giving sufficient weight to the equities and hardships that they would face if they were deported to Mexico.

The case of Romero-Morales v. INS, 25 F. 3d 125, 129 (9th Cir. 1994), established that the BIA is required to consider the record as a whole and to review all relevant evidence when deciding a motion to reopen.

Furthermore it is clear that the Petitioners in this matter have had their due process violated in that the BIA dismissed the Petitioner's appeal. This dismissal shows that the BIA failed to make more than even a cursory review which amounts to colorable due process in this context. Larita-Martinez v. INS, 220 F. 3d 1092, 1095-96 (9th Cir. 2000).

Petitions for Review such as the one made by the Petitioners are presently evaluated under the same standards employed by district courts in evaluating motions for preliminary injunctive relief. Lopez v Heckler, 713 F. 2d 1432, 1435, 463 U.S. 1328 (1983). In Lopez it is stated, "The petitioner must show either a probability of success on the merits and the possibility of irreparable injury, or that serious legal hardships are raised and the balance of hardships tips sharply in the petitioner's favor."

The case of Arthurs v. INS, 959 F 2d 142, 143-44 (9th Cir. 1992) states that, "These standards represent the outer extremes of the continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified."

In the case of Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, (1988), the court held that an order by a federal court that relates only to the conduct or progress of litigation by the court ordinarily is not considered an injunction, and therefore is not appealable. However the Supreme Court went on to hold that it will continue to provide appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions and have serious and perhaps irreparable consequences

Prior to the enactment of the Illegal Immigration Reform Act. the filing of a Petition For Review automatically stayed a petitioner's deportation pending appellate review in most cases. This has been well stated in the case of De Leon v. INS, 115 F 3d 643, 644, (9th Cir. 1997).

The institution of IIRIRA, 1n 1996, brought immense change to the court's jurisdiction to review final deportation and exclusion orders. The new law established permanent rules that apply to removal proceedings that were initiated against aliens on or after April 1, 1997. As part of the changes made to the petition for review process, IIRIRA eliminated the automatic stay provisions and replaced it with provisions similar to the stay provisions applicable to aliens convicted of an aggravated felony under the old INA. These changes were upheld in the case of Kalaw v. INS, 133 F 3d 1147, 1149 (9th Cir. 1997).

Although the old immigration law provided for an automatic stay when a petition was filed for review, some cases were considered exceptions. Under former INA Section 1252 (f) (2), stays were not automatic in the case of removal proceedings against convicted felons. In Arthurs v. INS, 959 F 2d 142, 143-44 (9th Cir. 1992), a case involving an aggravated felon, it was stated that aliens convicted of an "aggravated felony," within the definition of the INA, were not automatically entitled to a stay of deportation pending their appeal. For these aliens the court had the discretion to grant a request for a stay of deportation, after evaluating the stay request under the same standards that were applied in the district courts in evaluating a preliminary injunction.

During the evolution of the Immigration and Nationality Act, the case of Artukovoc v. Rison, 784 F 2d

1354, 1355, (9th Cir. 1986), added a further requirement that specified "that the petitioner is required to establish either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of the hardships tips sharply in petitioner's favor."

It has now been clearly established that 8 U.S.C. Section 1252 (f) (2) applies to the grant of a temporary stay for an alien once a decision of removal has been ordered. Maldonado v. Fasno, 67 F. Supp. 2d 1170, 1175. 1175 (S.D.Cal. 1999). Under Section 1252 (f) (2) it is stated that; "A final order for removal cannot be stayed "unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." The terms "clear and convincing," have been held as an intermediate standard, not as high as that of proof "beyond a reasonable doubt," but higher than a "preponderance of evidence." United States v. Meza-Soria, 935 F. 2d. 166, 169, (9th Cir. 1991).

With respect to factual challenges, Section 1252 (f) (2) requires that the alien establish that the order or removal was "manifestly contrary to law." In Dickinson v. Zurko, 527 U.S. 150, 155 (1999), "manifest" was described as something that is apparent, obvious, clear, or undisputable.

Therefore based on the above decisions it is entirely proper for the court herein to review the denial of Petitioner's stay, and the denial of their appeal to the 9th Circuit because there is a high probability that they can prevail on the merits of their claim. Petitioners can also demonstrate that their American citizen children, their American citizen father, and Lawful Permanent Resident mother will suffer irreparable harm if they are removed from the United States.

## REASONS FOR GRANTING THE WRIT

The United States Code Section 1254 (a) (1) provides that the Attorney General may cancel the deportation of an alien where such alien: "Is deportable under any law of the United States...; has been physically present in the United States for a continuous period of ten years immediately preceding the date of such application, and proves that during all of such period he was, and is, a person of good moral character; and is a person whose deportation would in the opinion of the Attorney General, result in extreme hardship to his spouse, parent or child, who is a citizen of the United States, or an alien lawfully admitted for permanent residence."

In the case at hand Petitioners have established fourteen years of continuous presence in the United States in compliance with INA Section 244 (b) (2). Since Petitioners never left the United States there was no break in their continuous physical presence. The Immigration Judge agreed that the Petitioners met the requirement for continuous presence in the United States for the requisite period.

The Act also states that the person applying for relief must be of good moral character, both statutorily, and in the exercise of discretion. The Petitioners have never been arrested or convicted of a crime as evidenced by his their own testimony and documentary evidence or record. The Immigration Judge found that the Petitioners met the requirements of good moral character.

However, the 9th Circuit Court of Appeals erred in supporting the Immigration Judge's finding that the

Petitioners did not establish extreme hardship as required by the Act.

Many factors must be taken into consideration in making a determination of extreme hardship. All factual data and relevant facts presented must be completely analyzed.

"Failure to consider any of the facts presented constitutes an abuse of discretion" In making its determination, the court should look at: "age of the subjects, family ties in the U.S. and abroad; length of residency in the U.S. conditions of health, conditions in the country to which the alien is returnable, economic, political, and financial status, business and occupation, the possibility of other means of adjustment, whether of special assistance to the U.S. or the community, and immigration history. "In making this determination, relevant factors though not determinative in themselves must be considered in the aggregate in determining whether extreme hardship exists." Salamenda v. INS, 70 F. 3d 447 (7th Cir. 1995).

The 9th Circuit Court of Appeal erred and abused its discretion in supporting the position of the BIA that the evidence presented by the Petitioner did not support their argument that their removal would cause extreme hardship to their American citizen children and their Lawful Permanent Resident parents. Petitioner showed through their testimony that these individuals would be affected emotionally and sustain damaging effects if Petitioners were removed and their home was broken up.

Separation from family and children may be considered the most extreme form of hardship. Bastides v. Immigration and Naturalization Service. 609 F.2d 101 (1979), established that emotional issues must be

considered factors in determining hardship. In that instance the court failed to recognize emotional hardship which would result from separation of the alien who expressed deep affection for his child, and who had been shown to have acted consistently with his expression of affection. Therein insufficient consideration was given to non-economic hardship which would result from the alien's deportation. Thus remand was required in this case.

Historically the court has ruled that family and relationships between family members occupies a place of central importance in our nation's history and are a fundamental part of the values that underlie our society. Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977).

Additionally the court in Urbano de Malaluan v. Immigration and Naturalization Service, 577 F. 2d 589 (9th Cir. 1978), reversed an order of the Board of Immigration Appeals denying a motion to reopen proceedings, emphasizing that the "separation of the petitioner from members of her family who are United States citizens must be considered in conjunction with economic detriment in reaching the eligibility decision."

In Wang v. Immigration and Naturalization Service, 622 F.2d 1341 (1980), the court reasoned that the minor children of the Wangs , who have spent their whole lives in the United States, may suffer potential hardship if they were forced to leave this country. Accordingly the court held that the Board should not have summarily dismissed the Wang's claim of hardship to their children. It was held that the effect that the deportation of the parents would have on the Wang children should be determined only after a hearing.

In Ramirez-Gonzalea v. INS, 794F. 2d 491 (9th Cir 1986), and in Carnalla-Munoz v. INS. 627, F 2d 1004 (9th Cir. 1980), the court recognized that "the most important single hardship factor may be the separation of the alien from the family living in the United States. It was further held in Prapavat v. INS, 662F. 2d 561, 563 (9th Cir. 1981), that "Family unity is always an important consideration, " and "Failing to consider the cumulative effect of all relevant factors in a case can also be found to be an abuse of discretion."

Additionally when the Court fails to consider the impact of separation of the parent from the child that can amount to an abuse of discretion on its part. Reyes-Melendrez v. INS, --F. 3d—2003 WL 22053448, (9th Cir. Sep. 4, 2003).

Evidence presented by the Petitioners, which was not considered and evaluated included the fact that the Petitioner's American citizen and Lawful Permanent Resident mother are in their late eighties and sixties, respectively. Both have health problems and both have lived for some time with the Petitioners who have assumed their financial support. Although the Petitioners have other Permanent Lawful Resident siblings living here in the United States, it would be extremely difficult to uproot the Petitioner's parents and relocate them with other relatives who are unable to provide housing or financial assistance due to the demands of their own families. Although the Immigration Judge suggested that the Petitioner's elderly American citizen and Lawful Permanent Resident parents should also relocate to Mexico with the Petitioners, this is not a feasible alternative since the Petitioners have no family to assist them in reestablishing their lives in Mexico, nor to help them acquire housing and employment. The Petitioners testified that they would be unable to find sufficient

employment or housing, and would be unable to financially sustain the support of their children and parents in Mexico.

The Immigration Judge further erred in his summarized assessment of the status of the relocation and its affect of the Petitioner's children. His complete reflection upon this issue was summarized in his statement that dismissed hardship entirely, "They speak Spanish."

There was no consideration of the fact that the oldest child now fourteen years of age has been in this country since he was five months old. It would devastate this child to further his education in a new school system in a different language, with different entirely different focus. There was no consideration given to how disruptive this move would be in his life.

The Immigration Judge failed to take into account the emotional pain caused to the parents of the Petitioner and the grandchildren. In this instance the grandchildren actually live with their grandparents and the emotional attachment is especially great.

Recently the Bureau of Immigration appeals addressed a similar situation In Re Recinas, 23 I&N 467 (BIA 2002). Herein the Board reversed a denial of cancellation based on the fact that the respondent had lawful relatives in the United States. They further stated that the hardship of deporting a Mexican born child who has spent mot of their life in the United States would reverberate on the whole family.

In this instance the Petitioner has four siblings in the United States in addition to the Lawful Permanent Resident parents. The oldest child is now fifteen years old and has been in this country since she was five months

old. Enormous suffering would be created for everyone, including the United States citizen children of the Petitioners.

The case of Jara-Navarette v. INS, 813 F. 2d 1340, (9th Cir. 1986), strongly emphasized the point that the Court must examine every conceivable circumstance that may cause the United States citizen child of a respondent to suffer hardship due to his or her deportation. The Court stated, "In reviewing BIA decisions involving hardship to the United States citizen children, generalizing rather than individualized consideration and cursory treatment of individual circumstances constitute an abuse of discretion. Thus we have not hesitated to vacate denials of applications for suspension of deportation when the BIA abuses its discretion in examining hardship to United States citizen children." The failure of the Court to review and consider this evidence established that it did not act on evidence that was reasonable, substantial and probative.

Additionally courts in other than the Ninth circuit have been vigilant in ensuring that the BIA gives individualized consideration to United States citizen children. In Ramos v. INS, 695 F. 2d 181 (5th Cir. 1983), the petitioners had two United States children, ages seven, and nine, at the time of the deportation hearing. The Court held that the BIA had not sufficiently examined how a child of a grammar school age might suffer from being uprooted from his life in the United States and remanded the case for further consideration.

The failure of the Court to review and consider this evidence established that it did not act on evidence that was reasonable, substantial and probative.

In this instance the BIA evaluated the situation in one sentence, "These three children are very young, and they should be able to adapt successfully to Mexico."

An abuse of discretion on the part of a reviewing Court must create a situation in which the abuse negatively and distinctly impacts the outcome of the case. Rejection of all evidence presented, without carefully analyzing all of it terminates an alien's ability to obtain a favorable outcome. If the Court without thoughtful review of the Board's decision allows the dismissal of all evidence presented, any apply alien can fail to meet the requisite standard for hardship. While the Court is vested with authority and discretion, it must be exercised wisely and in a manner that assures that aliens who are before it are able to receive a full and fair review of their cases. This is becoming more important since fewer and fewer forms of judicial review are available under the present immigration laws.

When strong evidence is presented and yet disregarded, this goes directly to the merits of the case and is clearly an incorrect decision. When there is no justification for rejection of evidence, an abuse of discretion is likely present.

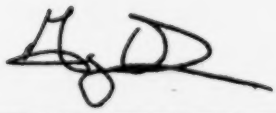
Herein the conduct of the reviewing Court denotes the rise of a colorable constitutional claim. The Court found in Chavez-Murillo v. INS, 1999 WL 728521 (9th Cir. 1999) that the Congressional intent to preclude judicial review of constitutional claims must be clearly evidenced. When the Board initially made a decision that the evidence presented was merely cumulative, it suggests that the Board failed to consider and evaluate the evidence in its entirety. This amounts to a failure of due process, raising an issue of a colorable constitutional claim. The Petitioners, their children, and their Lawful Permanent

Resident parents, and other relatives would suffer extreme emotional as well as financial hardship if petitioners were forced to return to Mexico.

## CONCLUSION

Petitioners, through his counsel, contend that the Ninth Circuit Court of Appeals erred in denying their Petition for Review and that this denial was manifestly contrary to law. Based upon the aforementioned, Petitioner respectfully requests that this Honorable Court grant the Writ of Certiorari, and permit their case to be reopened and remanded so that he can present his application for relief from removal before the Immigration Court.

Dated: December 30, 2004



GARY D. OLIVE
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FILED
Nov 23 2004
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| LUIS HUMBERTO SILVA VALLEJO, et. al.,<br><br>Petitioners,<br><br>v.<br><br>JOHN ASHCROFT, Attorney General,<br><br>Respondent. | No. 04-72602<br><br>INS Nos.<br>A78-768-553<br>A75-768-554<br><br>ORDER |

**Before:** LEAVY, McKEOWN, and BERZON, Circuit Judges

Respondent's motion to dismiss this petition for review for lack of jurisdiction is granted. *See* 8 U.S.C. Section 1252(a)(2)(B)(1); *Romero-Torres v. Ashcroft*, 327 F. 3d 887, 892, (9th Cir. 2003). All other pending motions are denied as moot. The temporary stay of removal and voluntary departure confirmed by *Desta v. Ashcroft*, 365 F. 3d 741 (9th Cir. 2004) and Ninth Circuit General Order 6.4(c) shall continue in effect pending issuance of the mandate.

APPENDIX A

U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office of Immigration Review

Falls Church, Virginia 22041

Date: APR 29 2004

File: A78-768-553 Los Angeles

In re: SILVIA VALLEJO, LUIS HUMBERTO SILVA SANCHEZ, NORA PATRICIA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ORDER;

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. Section 1003, 1 (e) (4). The respondent's request for oral argument before the Board is denied. See 8 C.F.R. Section 1001.1 (e)

FURTHER ORDER: Pursuant to the Immigration Judge's Order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statue, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. See section 240B (b) of the Immigration and Nationality Act; 8 C.F.R. Section 1240.26 (c). (f). In the event the respondent fails to so depart, the respondent shall be removed as provided in the Immigration Judge's order

APPENDIX B

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extension granted by the district director, the respondent shall be subject to a civil penalty of not less than $1000 and not more than $5000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and nationality Act. See section 240B(d) of the Act.

"s/_____"

FOR THE BOARD

The respondents have tendered documents with their appeal. This Board does not, however, consider evidence first proffered on appeal. See *Matter of Obaigbena*, 191 I&N Dec. 533 (BIA 1988); *Matter of Adeniji*, 22 I&N Dec. 1090 (BIA 1999).

8 U.S.C. Section 1254 (a) (1)

(a) Granting of status

(1) In general- In the case of an alien who is a national of a foreign state
Designated under subsection (B) (or in the case of an alien having no nationality, is a person who last habitually resided in such a designated state) and who meets the requirements of subsection (c), the Attorney General, in accordance with this section-

(A) May grant the alien temporary protected status in the United States and shall not remove the alien form the United States during the period which such status is in effect.

(b) Designations

(1) The Attorney General, after consultation with appropriate agencies of the Government may designate any foreign state (or any part of such foreign state) under this subsection only if-

(A) The Attorney General feels there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to that part of that state) would pose a serious threat to their personal safety.

INA Section 244 (b) (2)

"A brief, casual, and innocent departure from the U.S. that is not meaningfully disruptive does not break seven years continuous presence requirement."

APPENDIX D

**INA**
**§ 240**
**(e) Definitions**
In this section and section 240 A:

(1) **Exceptional Circumstances**
The term "exceptional circumstances" refers to exceptional circumstances (such as illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.